IN THE

Supreme Court of the United States

October Term, 1975

No. 75-1139

DOMINICK SANTIAGO,

Petitioner,

against

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner Dominick Santiago prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered in this case on January 12, 1976.

Opinions Below

The opinion of the United States Court of Appeals for the Second Circuit is unreported and is printed in Appendix B hereto. The United States District Court for the Eastern District of New York rendered no opinion.

Jurisdiction

The judgment of the United States Court of Appeals for the Second Circuit (Appendix C) was entered on January 12, 1976. The jurisdiction of this Court is invoked under § 1254(1), Title 28, U.S.C.

Questions Presented

Can a union official be held liable under § 664, Title 18, U.S.C., for criminal conversion of union welfare funds when portions of the funds were alternatively used for union as well as welfare purposes only, as appropriate, and not the official's personal benefit?

Can a union official be held criminally liable under § 1027, Title 18, U.S.C. for the falsification of union financial statements, when the alleged falsity concerned a failure to report, as union welfare funds, monies which had been instead included in the union's general funds?

Is a set-off by a union official of monies concededly owed him by a union against general funds of a union a criminal embezzlement of union funds in violation of § 501(c), Title 29, U.S.C.?

Does a letter appointing an attorney to be a "special attorney" to conduct grand jury proceedings involving violations of the "criminal laws of the United States" meet the specificity requirements of § 515(a), Title 28, U.S.C.?

Statutes Involved

The statutory provisions involved are §§ 664 and 1027, Title 18, United States Code, § 515(a), Title 28, United States Code, and § 501(c), Title 29, United States Code. They are printed in full in Appendix A.

Statement of the Case

Petitioner, Dominick Santiago, is the President of Local Union 3108 in New York City and is a trustee and administrator of the union's welfare fund. He was indicted on July 25, 1973, together with a bookkeeper and business agent of the union for, in essence, misapplying union welfare funds, filing false union financial statements, and embezzlement of union funds. The indictment was the product of a so-called "Special Attorney" of the Department of Justice, who conducted the grand jury proceedings.

Two of the three defendants were to be tried together, the business agent's case having been severed just prior to trial. Santiago's trial resulted in a jury verdict of guilty as to certain counts and he was sentenced on April 11, 1975 to five years imprisonment (4½ years of which were suspended), plus fines totalling $10,500. The bookkeeper was acquitted.

In Santiago's trial, which began on January 20, 1975 and ended on February 7th, the government called 26 witnesses and produced a record of some 2,000 transcript pages. But the evidence ultimately indicated only three significant factual conclusions that the jury could reach.

First, some of the union's welfare funds, contained in checks payable to the union with but one $808 exception, were placed in the general fund of the union and were not transferred to the welfare fund. The amount involved totalled some $9,500. There was no evidence, nor could there have been, that any of this money was ever used for Santiago's personal benefit. In addition the salary of a union organizer and business agent had been paid in part (two thousand dollars) for the organizer's efforts to organize workers in New York City and in the District of Columbia as well as purely welfare fund matters.

Second, the financial statements filed by the union's welfare fund excluded the approximately $9,500 that had been placed in the union's general fund. There was no evidence that any effort was made to falsify union records as part of an effort by the petitioner to apply welfare funds to his own use; the monies not in the welfare fund had simply not been reported as being part of that fund.

Finally, the government introduced evidence that Santiago had charged the union for about $800 of expenses that were personal in nature. But at the time, Santiago, a union official with a $10,000 annual salary, was owed more than $7,800 by the union and, when advised to do so by a union accountant, paid back a portion of the monies to the general fund.

Faced with this skimpy and confused * record, the Court of Appeals affirmed Santiago's criminal conviction, explaining in its opinion that its decision rested upon highly technical interpretations of the law. With respect to the § 664 issue, the court concluded that any common-law "conversion" of union property constituted a criminal offense. (*See* App. B., Slip Op. at 6584). But, should the criminality of one's conduct be determined by common-law concepts applicable to civil cases? The issue is not whether, under some concept of civil fiduciary law, Santiago can be obligated to ensure that the union's welfare fund is compensated for the monies used by the union. It is, instead, whether penal sanctions should be imposed on an individual officer where union monies are used for the general benefit of the union and all its members, not simply those for whom they had been earmarked.

In affirming the § 1027 conviction, the Court of Appeals merely bootstrapped its position. If monies were placed in

* Characterized as a "maze" by the trial court.

the union general fund, in order to meet the immediate needs of the union (and thereby, all its members) and not the welfare fund, at the moment, it would have been strange indeed to expect that they should be shown in an account other than the one in which they were placed. Under the Court of Appeals' interpretation of the law, a violation of § 1027 necessarily followed a violation of § 664. But if no § 664 violation occurred, it is likewise true that no § 1027 violation took place.

The third question resolved by the Court of Appeals concerns the right of a union's creditor to, in essence, set-off against union general credit funds in his possession, monies owed him by the union. (These monies were *not* welfare funds). The Court of Appeals concluded that any set-off was criminal because a union "is entitled to make its own determination of how best to use its limited resources." (Appendix B, Slip Op. at 6581). However, that analysis, taken to its logical conclusion, means that any creditor who exercises a right of set-off runs the risk of being guilty of criminal conversion. This is certainly not the intent of § 501(c).

REASONS FOR GRANTING THE WRIT

1. The decision appealed from decided important questions of federal law which have not been, but should be, decided by this Court.

The first question is that of the interpretation of § 664, Title 18, U.S.C. That section makes it a crime if someone "converts to his own use or to the use of another" union welfare funds. The legislative history of § 664 is devoid of any definition of this phrase.

The question that ought to be resolved is whether commingling by a union of its funds, both general and welfare,

was intended by Congress to be a *criminal* offense. Or did Congress, instead, intend to impose such sanctions against the personal use of such funds by the person converting them or by some other identifiable individual or company.

Certainly, one cannot say that it is clear that Congress intended commingling by a union of its funds to be criminal. Indeed, on other occasions when it has so intended it has said so clearly. *See, e.g.*, § 1707, Title 18, U.S.C. Since criminal statutes must be written with clarity and specificity and are to be interpreted with lenity, *see, e.g., United States* v. *Bass*, 404 U.S. 336, 347-48 (1971), the conclusion that should be reached is that mere commingling is not a crime.

The § 1027 issue is of a similar nature. If it is not a *crime* for a union to commingle its funds, can it be a crime for it to not report commingled funds separately? The second issue simply parallels the first.

The Court of Appeals also upheld the use of omnibus "Special Attorney" commissions by the Department of Justice, a practice that was rejected in well-reasoned opinions of three district courts in *United States* v. *Crispino*, 392 F. Supp. 764, *rev'd*, 517 F. 2d 1395 (2d Cir. 1975); *United States* v. *Dulski*, 395 F. Supp. 1259 (E.D. Wisc. 1975); *United States* v. *Wrigley*, 392 F. Supp. 9 (W.D. Mo.), *rev'd*, 520 F. 2d 362 (8th Cir. 1975); and *United States* v. *Williams*, 65 F.R.D. 442 (W.D. Mo. 1974). In so doing, the Court of Appeals relied upon its decision *In re Persico*, 522 F.2d 41 (2d Cir. 1975).

The use of "special attorneys" is a narrowly circumscribed option available to the Department of Justice under § 515(a), Title 28, U.S.C. It allows an "attorney specially appointed by the Attorney General" to conduct grand jury

proceedings *only* "when specifically directed by the Attorney General".

The language of § 515(a) requires *specificity* in the commission appointing such an attorney. Yet the only language in the appointment letter of the "Special Attorney" who conducted the grand jury that indicted Santiago which even arguably authorized his actions was a statement referring to "criminal laws of the United States." A less specific authorization could scarcely be conceived.

Certainly the use of such "special attorneys" is not sanctioned by § 515(a). The approval of the practice of authorizing omnibus appointments merits review and reversal.

2. The decision of the Court of Appeals has so far departed from the accepted and usual course of judicial proceedings that an exercise of this Court's power is called for.

The Court of Appeals' decision in the instant case as to § 501(c) means, in essence, that as against union general funds, set-off's by a creditor who is a union official, are criminally punishable. The right of set-off is, however, firmly rooted in American jurisprudence. *E.g., Gratiot* v. *United States*, 40 U.S. (15 Pet.) 336 (1841). Through judicial fiat the United States Court of Appeals for the Second Circuit has abrogated this principle in dealings involving unions and their officials. This is a departure from the accepted course of judicial proceedings that demands immediate redress.

CONCLUSION

For the foregoing reasons the petition for a writ of certiorari should be granted.

Dated: New York, New York
February 9, 1976.

Respectfully submitted,

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APPENDIX A

Statutory Provisions Involved

18 U.S.C. § 664, as then in effect, provided:

§ 664. Theft or embezzlement from employee benefit plan

Any person who embezzles, steals, or unlawfully and willfully abstracts or converts to his own use or to the use of another, any of the moneys, funds, securities, premiums, credits, property, or other assets of any employee welfare benefit plan or employee pension benefit plan, or of any fund connected therewith, shall be fined not more than $10,000, or imprisoned not more than five years, or both.

As used in this section, the term "any employee welfare benefit plan or employee pension benefit plan" means any such plan subject to the provisions of the Welfare and Pension Plan Disclosure Act.

18 U.S.C. § 1027, as then in effect, provided:

§ 1027. False statements and concealment of facts in relation to documents required by the Welfare and Pension Plans Disclosure Act

Whoever, in any document required by the Welfare and Pension Plans Disclosure Act (as amended from time to time) to be published, or kept as part of the records of any employee welfare benefit plan or employee pension benefit plan, or certified to the administrator of any such plan, makes any false statement or representation of fact, knowing it to be false, or knowingly conceals, covers up, or fails to disclose any fact the disclosure of which is required by such Act or is necessary to verify, explain, clarify or check for accuracy and completeness any report required by such Act to be published or any information required by such Act to be certified, shall be fined not more than $10,000, or imprisoned not more than five years, or both.

Appendix A

28 U.S.C. § 515 provides:

§ 515. Authority for legal proceedings; commission, oath, and salary for special attorneys

(a) The Attorney General or any other officer of the Department of Justice, or any attorney specially appointed by the Attorney General under law, may, when specifically directed by the Attorney General, conduct any kind of legal proceeding, civil or criminal, including grand jury proceedings and proceedings before committing magistrates, which United States attorneys are authorized by law to conduct, whether or not he is a resident of the district in which the proceeding is brought.

(b) Each attorney specially retained under authority of the Department of Justice shall be commissioned as special assistant to the Attorney General or special attorney, and shall take the oath required by law. Foreign counsel employed in special cases are not required to take the oath. The Attorney General shall fix the annual salary of a special assistant or special attorney at not more than $12,000.

29 U.S.C. § 501(c) provides:

§ 501. Fiduciary responsibility of officers of labor organizations—Duties of officers; exculpatory provisions and resolutions void

• • •

(c) Any person who embezzles, steals, or unlawfully and willfully abstracts or converts to his own use, or the use of another, any of the moneys, funds, securities, property, or other assets of a labor organization of which he is an officer, or by which he is employed, directly or indirectly, shall be fined not more than $10,000 or imprisoned for not more than five years, or both.

APPENDIX B

Opinion Below

UNITED STATES COURT OF APPEALS

For the Second Circuit

No. 1280—September Term, 1974.

(Argued August 15, 1975 Decided January 12, 1976.)

Docket No. 75-1179

United States of America,

Appellee,

v.

Dominick Santiago,

Defendant-Appellant.

Before:

Gurfein, Van Graafeiland and Meskill,

Circuit Judges.

Appeal from a judgment of the United States District Court for the Eastern District of New York, Thomas C. Platt, *Judge*, after a jury trial, convicting appellant of converting union general funds and welfare funds and making false statements in welfare fund financial reports.

Affirmed.

Grunewald, Turk, Gillen & Ford, New York, N. Y. (Raymond B. Grunewald, of Counsel), *for Appellant.*

David G. Trager, United States Attorney for the Eastern District of New York (Donald F.

McCaffrey, Thomas Goldstein, Special Attorneys, U. S. Department of Justice, Jerome M. Feit, David E. Roseberry, Attorneys, U. S. Department of Justice, on the Brief), *for Appellee.*

VAN GRAAFEILAND, *Circuit Judge:*

After a jury trial in the United States District Court for the Eastern District of New York, appellant was convicted on three counts of converting union welfare funds (18 U.S.C. § 664), one count of converting union general funds (29 U.S.C. § 501(c)) and two counts of making false statements in welfare fund financial reports (18 U.S.C. § 1027). We affirm.

During the period covered by the indictment (1968-72) appellant was president of Local 3108, AFL-CIO, a New York City labor organization subject to the provisions of the Labor-Management Reporting and Disclosure Act, 29 U.S.C. § 401 *et seq.* Appellant was also the administrator and a trustee of the union's Brotherhood Welfare Fund, a welfare fund within the meaning of the former Welfare and Pension Plans Disclosure Act, 29 U.S.C. § 301 *et seq.*[1]

The assets of the Welfare Fund were under the supervision and control of a Board of Trustees selected from management and labor and were required to be kept separate and apart from the general fund of the union. Employers making payment to Local 3108 on behalf of its members sometimes sent separate checks for the general fund and the Welfare Fund and sometimes sent single

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1 The Welfare and Pension Plans Disclosure Act was repealed as of January 1, 1975 by the Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1001 *et seq.*, which provides in part that the repealed Act shall continue to apply to any conduct and events which occurred before January 1, 1975. 29 U.S.C. § 1031(a)(1).

checks with notations as to how payment should be applied. The proof, construed most favorably to the government, established that on several occasions appellant willfully diverted monies earmarked for the Welfare Fund into the general coffers of the union.

Appellant was convicted for violation of 18 U.S.C. § 664 which provides in pertinent part that "any person who embezzles, steals, or unlawfully and willfully abstracts or converts to his own use or to the use of another" the funds or assets of a welfare plan which is subject to the provisions of the Welfare and Pension Plans Disclosure Act shall be fined and/or imprisoned. Appellant contends that the general fund of the union does not fall within the meaning of the term "another" as used in this statute. We disagree.

The District Court, correctly and without exception, charged that the Welfare Fund was not the asset or property of the union. It belonged to participants in the Fund and their beneficiaries.[2] Diversion of Welfare Fund assets into the union's general fund was a conversion for the benefit of the membership as a whole and differed only in degree from a diversion of such funds into the hands of a smaller group or an individual union member. The legislative history of § 664 clearly indicates that its intended purpose was to preserve welfare funds for the protection of those entitled to their benefits. 1962 U.S. Code Cong. and Admin. News 1532 (H.R. Rep. No. 998). This purpose

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2 29 U.S.C. § 302(a)(1) provided as follows:

> The term "employee welfare benefit plan" means any plan, fund, or program which is communicated or its benefits described in writing to the employees, and which was heretofore or is hereafter established by an employer or by an employee organization, or by both, for the purpose of providing for its participants or their beneficiaries, through the purchase of insurance or otherwise, medical, surgical, or hospital care or benefits, or benefits in the event of sickness, accident, disability, death, or unemployment.

would be ill-served if such a narrow meaning were ascribed to the term "another" as to exclude the general fund of the union from its scope.

Appellant was also convicted on another count of using Welfare Fund money to pay the salary of a union organizer and business agent. Although appellant has included this conviction within his omnibus claims of error, he has advanced no serious arguments to support this inclusion. We are satisfied that this was not the result of oversight. *Cf. Brown* v. *Bullock,* 294 F.2d 415, 420 (2d Cir. 1961). The checks were drawn upon the Welfare Fund in payment for services rendered to the union. The jury was entitled to find that they represented funds which had been converted to the use of "another."

The Government introduced evidence, uncontroverted by appellant, that he used money from the union's general fund to pay for personal purchases and traveling expenses. This was found to be in violation of 29 U.S.C. § 501(c) which provides that any officer of a labor organization who "embezzles, steals, or unlawfully and willfully abstracts or converts to his own use or the use of another" any of the organization's funds or assets shall be fined and/or imprisoned.

Appellant concedes that his travel expenses to such varied locales as Switzerland, France and the Virgin Islands "appeared" to be personal in nature but argues that the Government's proof did not sufficiently preclude the possibility of subsequent ratification of these expenditures. Whether there can be ratification of the expenditure of union funds for non-union purposes is a question we need not now decide. *See United States* v. *Goad,* 490 F.2d 1158, 1166 (8th Cir.), *cert. denied,* 417 U.S. 945 (1974); *cf. United States* v. *Dibrizzi,* 393 F.2d 642, 645 (2d Cir. 1968). The trial judge instructed the jury to measure appellant's

conduct by the test we approved in *United States* v. *Ottley*, 509 F.2d 667, 671 (2d Cir. 1975), viz, did appellant have a good-faith belief that the funds were being used for union business and that the union had properly authorized the expenditures or would properly ratify them. Measured by this test, appellant's conduct was found wanting. We see no error.

Although there was evidence that the union was indebted to appellant during the period in question, this did not require that he be absolved of liability for the unauthorized conversion of union funds, *see United States* v. *Bryant*, 430 F.2d 237, 239-40 (8th Cir. 1970), especially since none of the expenditures was credited against the outstanding indebtedness. A union in financial straits, as Local 3108 was, is entitled to make its own determination of how best to use its limited resources. At most, the indebtedness was an item which could be considered by the jury in determining the reasonable likelihood of ratification.

As administrator of the Welfare Fund, appellant was required by 29 U.S.C. § 304 to file annual financial reports. He was found guilty of violations of 18 U.S.C. § 1027 which makes it an offense if, in such document, one "makes any false statement or representation of fact, knowing it to be false, or knowingly conceals, covers up, or fails to disclose any fact the disclosure of which is required by such Act or is necessary to verify, explain, clarify or check for accuracy and completeness any report required by such Act to be published or any information required by such Act to be certified." These findings were based upon substantial understatements of the amount of employee contributions to the Welfare Fund. Appellant could not transfer the responsibility for these understatements to the accountant who prepared the reports because the accountant was not hired to make any audit or to verify the ac-

curacy of the figures with which he was supplied. The trial court properly charged that the Government was required to prove beyond a reasonable doubt that appellant made the false statements knowing the same to be false. *United States* v. *Ferrara*, 451 F.2d 91, 96-97 n.10 (2d Cir. 1971). In view of the overwhelming proof that appellant knowingly diverted employee contributions intended for the Welfare Fund, we see little merit in his argument that the evidence did not support his conviction for knowingly understating the amount of employee contributions in the annual reports.

On June 24, 1970, appellant attended a compliance conference with representatives of the New York State Insurance Department. These officials advised appellant that expenses which should have been paid out of the general fund were being improperly paid from the Welfare Fund. Appellant agreed to correct this situation and thereafter wrote several letters relative to the proposed corrective measures. Proof of these facts was admitted as bearing upon the knowledge, intent or willfulness with which appellant did the similar acts charged in the indictment. Appellant contends that this was error, because the evidence involved the violation of State regulations rather than the Federal statutes at issue herein. This argument, we think, misses the point. It has long been the law of this Circuit that similar acts may be proved in order to show guilty knowledge. *United States* v. *Seeman*, 115 F.2d 371, 373 (2d Cir. 1940). Indeed, we have held that evidence of relevant similar acts, including other crimes, is admissible for all purposes except to show defendant's criminal character or disposition. *United States* v. *Brettholz*, 485 F.2d 483, 487 (2d Cir. 1973), *cert. denied*, 415 U.S. 976 (1974); *United States* v. *Deaton*, 381 F.2d 114, 117 (2d Cir. 1967); *United States* v. *Bozza*, 365 F.2d 206, 213 (2d Cir. 1966).

Appellant's concern about the possible disparity in the language of the New York regulations and the Federal statutes is unwarranted. It is the similarity of conduct which determines relevancy, not identity of language in the statutes violated. *United States* v. *Gocke*, 507 F.2d 820, 825 (8th Cir. 1974), *cert. denied*, 420 U.S. 979 (1975); *United States* v. *Wetzel*, 514 F.2d 175, 178 (8th Cir. 1975). In admitting this testimony, the District Court did not go outside the "wide range of discretion" accorded to it. *United States* v. *Feldman*, 136 F.2d 394, 399 (2d Cir. 1943), *aff'd*, 322 U.S. 487 (1944); *United States* v. *Braverman*, 376 F.2d 249, 252 (2d Cir.), *cert. denied*, 389 U.S. 885 (1967).

Appellant's brief sets forth a battery of complaints about the trial court's instructions to the jury. However, the lack of any objection below raises a hurdle which is not surmounted by appellant's claim of "plain error." Fed.R. Crim. P. 30; *United States* v. *Pinto*, 503 F.2d 718, 723 (2d Cir. 1974); *United States* v. *Indiviglio*, 352 F.2d 276 (2d Cir. 1965), (*en banc*), *cert. denied*, 383 U.S. 907 (1966); *United States* v. *Projansky*, 465 F.2d 123, 135 (2d Cir.), *cert. denied*, 409 U.S. 1006 (1972).

There was no plain error in the failure of the court to submit to the jury, as a question of fact, the interpretation of the word "another" as used in 29 U.S.C. § 501(c) and 18 U.S.C. § 664. Statutory construction is for the court, not the jury. *United States* v. *Guterma*, 281 F.2d 742, 751-52 (2d Cir.), *cert. denied*, 364 U.S. 871 (1960); *Caldwell* v. *United States*, 218 F.2d 370, 372 (D.C. Cir. 1954), *cert. denied*, 349 U.S. 930 (1955).

The District Court told the jury that the use by appellant of Welfare Fund monies for purposes other than those which the contributors intended meant the same thing as conversion to appellant's own use or to the use of another.

While this would not be the language of our choice, we do not find it to be prejudicially erroneous. In calculating the effect of alleged error, we must look at the instructions as a whole. *United States* v. *Pinto, supra,* 503 F.2d at 724. The charge was clear as to the necessity for a finding of fraudulent intent in connection with the use of the Welfare Fund money. If appellant fraudulently dispersed such funds for purposes unrelated to welfare, he must have put them to his own use or the use of another. Other possible uses do not come readily to mind.

Moreover, we find no merit in appellant's argument that, since he personally pocketed no money from the Welfare Fund, the trial court should not have submitted to the jury the issue of conversion "to his own use" under § 664. The phrase "to his own use" is a carry over from the common-law pleading in trover, *Hubbard* v. *United States,* 79 F.2d 850, 854 (9th Cir. 1935), and does not require a showing that the misappropriation was for the personal advantage of the defendant. *United States* v. *Harrelson,* 223 F.Supp. 869 (E.D. Mich. 1963). One's disposition of the property of another, without right, as if it were his own, is a conversion to one's own use. Conversion to "one's own use" means simply "not to the use of the entruster." *United States* v. *Goad, supra,* 490 F.2d at 1165-66.

Assuming, however, that personal benefit to defendant was a requisite finding under the statute, we think the jury could have found that defendant benefited indirectly because of his status as a salaried officer and creditor of the union. Violation of the statute cannot be condoned simply because it is accomplished by indirect means. *Cf. United States* v. *Vitale,* 489 F.2d 1367, 1370 (6th Cir. 1974).

Other asserted errors in the charge are of insufficient merit to justify comment.

Appellant finally contends that a special "strike force" attorney is unauthorized to appear before a grand jury. His attempt to distinguish *In re Persico*, 522 F.2d 41 (2d Cir. 1975), because the crimes for which he was indicted did not involve racketeering or other "organized crime" activity, is without substance. We mention it only in the hope of finally laying this contention to rest.

The judgment of conviction is affirmed.

APPENDIX C

Judgment of Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the twelfth day of January, one thousand nine hundred and seventy-six.

Present:

HON. MURRAY I. GURFEIN
HON. ELLSWORTH VAN GRAAFEILAND
HON. THOMAS J. MESKILL
Circuit Judges.

75-1179

———o———

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

DOMINICK SANTIAGO, a/k/a Nick Sands, RENEE SIMINOFSKY, a/k/a Renee Sims, KENNETH BELLSEY,
Defendants,

DOMINICK SANTIAGO, a/k/a Nick Sands,
Defendant-Appellant.

———o———

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK.

Appendix C

This cause came on to be heard on the transcript of record from the United States District Court for the Eastern District of New York, and was argued by counsel.

On Consideration Whereof, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed in accordance with the opinion of this court.

A. Daniel Fusaro
Clerk

by Vincent A. Carlin
Vincent A. Carlin
Chief Deputy Clerk

No. 75-1139

In the Supreme Court of the United States

OCTOBER TERM, 1975

DOMINICK SANTIAGO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1139

DOMINICK SANTIAGO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends that the evidence was insufficient to establish the offenses charged and that the government attorney who presented the case to the grand jury lacked proper authorization.

Following a jury trial in the United States District Court for the Eastern District of New York, petitioner was convicted of converting union welfare funds to the use of the union general fund, in violation of 18 U.S.C. 664 (counts 4, 5, and 7), converting union general funds to his own use, in violation of 29 U.S.C. 501(c) (count 11), and filing false annual financial reports as to union welfare funds, in violation of 18 U.S.C. 1027 (counts 9 and 10). He was sentenced to concurrent terms of six months' imprisonment to be followed by four and one-half years' probation on each of the six counts and was fined $500 each on counts 4, 5, and 7 and $3,000 each on counts 9, 10, and 11. In an opinion on which we primarily rely, the court of appeals affirmed (Pet. App. B).

The evidence, which is not in dispute, is set forth in the opinion of the court of appeals. It shows that petitioner was the president of Local Union 3108 in New York City and was also the administrator and trustee of the union's welfare fund. The assets of the welfare fund were under the general supervision and control of a board of trustees and were required to be kept separate from the general fund of the union. Petitioner used the welfare fund monies, however, to pay the salary of a union organizer and business agent (Pet. App. 4a, 6a; Tr. 1053-1060, 1372-1395), and on several occasions he willfully diverted certain employers' payments to the welfare fund into the union general fund (Pet. App. 5a; Tr. 136-139, 260-263, 309-319, 511-516, 523-564, 593-600, 638-653, 701-707, 1264-1267). Petitioner also knowingly understated the amount of employee contributions to the union welfare fund in the annual financial report he was required to file as administrator (Pet. App. 7a-8a; Tr. 43-44, 1217-1235, 1241-1243, 1264-1275). Moreover, he used money from the union's general fund to pay for personal purchases and traveling expenses to Switzerland, France, and the Virgin Islands (Pet. App. 6a; Tr. 36-37, 657-672).

1. Petitioner contends (Pet. 5-6) that 18 U.S.C. 664, making it unlawful for any person to convert employee welfare funds "to his own use or to the use of another," does not prohibit the conversion of union welfare funds to union general funds. Petitioner offers no persuasive reason to believe, however, that a union itself may not be "another" to whom the conversion of monies earmarked for specified beneficiaries is proscribed. The point of the prohibition is to preserve intact and inviolate a fund established and maintained for intended purposes and recipients, and the identity of the beneficiary of the unlawful conversion cannot make the deliberate diminution of the fund any the less criminal. As the court of appeals observed (Pet. App. 5a-6a):

> [T]he Welfare Fund was not the asset or property of the union. It belonged to participants in the Fund and their beneficiaries. Diversion of Welfare Fund assets into the union's general fund was a conversion for the benefit of the membership as a whole and differed only in degree from a diversion of such funds into the hands of a smaller group or an individual union member. The legislative history of §664 clearly indicates that its intended purpose was to preserve welfare funds for the protection of those entitled to their benefits. 1962 U.S. Code Cong. and Admin. News 1532 (H.R. Rep. No. 998). This purpose would be ill-served if such a narrow meaning were ascribed to the term "another" as to exclude the general fund of the union from its scope.

Thus petitioner's contention (Pet. 3) that none of the converted money was ever used for his personal benefit, even if true (but see Pet. App. 6a; Tr. 36-47, 657-672), is irrelevant to the question whether he converted the funds "to the use of another." Moreover, as the court of appeals observed (Pet. App. 10a), the statutory language "to his own use" does not require a showing that the misappropriation was for the personal advantage of the defendant, since any unlawful disposition of the property of another amounts to a conversion to one's "own use," which means simply "not to the use of the entruster." *United States* v. *Goad,* 490 F.2d 1158, 1165-1166 (C.A. 8), certiorari denied, 417 U.S. 945. In any event, the court of appeals correctly determined (Pet. App. 10a) that, even assuming

> that personal benefit to defendant was a requisite finding under the statute, * * * the jury could have found that [petitioner] benefited indirectly because of his status as a salaried officer and creditor of the union. Violation of the statute cannot be condoned

simply because it is accomplished by indirect means. *Cf. United States* v. *Vitale,* 489 F.2d 1367, 1370 (6th Cir. 1974).

2. As petitioner recognizes (Pet. 6), his second claim—that it cannot be a violation of 18 U.S.C. 1027 to fail to report that union welfare funds have been diverted into the union general fund—stands or falls upon the strength of his initial argument that such a diversion is itself not unlawful. For the reasons just stated, however, petitioner's conviction for conversion of welfare funds was entirely proper, and thus it follows that his conviction for falsifying the annual financial reports to conceal the unlawful act was proper as well.

3. Petitioner also complains (Pet. 6-7) of the adequacy of the authorization under 28 U.S.C. 515(a) of the Special Attorney who presented the case to the grand jury. Such a challenge to the initiation of the prosecution is required to be raised before trial. Fed. R. Crim. P. 12(b)(2); see *Davis* v. *United States,* 411 U.S. 233, 236-237. The claim is in any event without substance. Here the Special Attorney, by a commission under Section 515(a) properly authorized by the Deputy Attorney General, was directed to concern himself with violations of the "criminal laws of the United States."[1] The generality of this authorization did not invalidate either the Special Attorney's appearance before the grand jury or the presentation by him of evidence relating to the crimes of which petitioner has been convicted. *In re Subpoena of Persico,* 522 F.2d 41 (C.A. 2); *United States* v. *Wrigley,* 520 F.2d 362 (C.A. 8), certiorari denied, November 17, 1975 (No. 75-5284).

4. Contrary to petitioner's claim (Pet. 7), the court of appeals' decision has not abrogated any right that may

[1]Pet. 7; see also the government's appellate brief at 26.

exist on the part of a union official to set off from the union's general fund a debt lawfully owed by the union to him. There was no evidence in this case that petitioner was in fact drawing funds against the debt owned him, or that the amount due him was decreased as he used union funds to pay personal expenses. Rather, the evidence clearly showed that the use of union funds by petitioner was both unauthorized by the union and undisclosed by petitioner. Thus, in affirming his conviction the court of appeals has not departed "from the accepted course of judicial proceedings" (Pet. 7), and there is no occasion for further review.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

APRIL 1976.